Smurfit-Stone Container Corporation, Container Division *and* International Brotherhood Of Electrical Workers, Local No. 1924, AFL–CIO. Case 12–CA–20804

May 16, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On September 11, 2003, Administrative Law Judge Margaret G. Brakebusch issued the attached decision. The Respondent filed exceptions with supporting arguments. The General Counsel filed an answering brief and limited cross exceptions.[1] The Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

Relevant Facts and Arguments

The Respondent operates a paper mill and a container plant at its Fernandina Beach, Florida facility. The Union, along with two other unions, has represented employees at the container plant at least since the 1970's.[2] The Respondent and the Union were parties to a collective-bargaining agreement. The agreement included, among other provisions, several provisions relating to attendance and a management-rights clause.

In 1979, the Respondent unilaterally implemented a new attendance control policy. The 1979 policy was a "no fault" policy, which did not excuse medical absences. Sometime between 1979 and 1984, the Respondent unilaterally modified that policy to excuse absences that were supported by a doctor's note.

On February 26, 2000, the Respondent notified the Union that it would implement a new attendance control policy, effective March 15, 2000. That new policy made no provision for excusing medical absences. Prior to implementation, the Respondent met with representatives of the Unions representing the employees covered by the new policy. On March 13, several representatives of the Union met with the Respondent and asserted the Union's belief that the new policy conflicted with several sections of the parties' collective-bargaining agreement and constituted a unilateral change about which the Union wanted to bargain. The Respondent replied that the attendance policy was a matter of company policy over which it was not required to bargain.

The Respondent implemented the new policy on March 15. On March 28, the Union filed a grievance, claiming that the policy violated the collective-bargaining agreement and past practice. On June 13, the Respondent denied the grievance, asserting that management had an exclusive right to establish rules and policies. On April 24, the Union filed an unfair labor practice charge arising out of the implementation of the new policy. Applying *Collyer Insulated Wire*, 192 NLRB 837 (1971), the Regional Office of the Board deferred consideration of the charge until the parties arbitrated the dispute. On June 3, 2002, the arbitrator issued a decision, denying the Union's grievance, finding that the Respondent had the right to unilaterally implement the new attendance policy.

The judge declined to defer to the arbitration award. She concluded that the issues considered by the arbitrator were not parallel to the unfair labor practice issues and that his award was clearly repugnant to the Act. She then found that the Respondent's implementation of its new attendance control policy constituted an unlawful midterm modification of the collective-bargaining agreement and a unilateral change in the employees' terms and conditions of employment in violation of Section 8(a)(5).

The Respondent excepts, arguing that the Board should defer to the arbitrator's decision. The Respondent argues that the arbitrator's award meets the Board's standards for deferral because his award was based on the management-rights clause of the parties' agreement and because the arbitrator considered virtually the same facts as were presented at the unfair labor practice hearing.

For the following reasons, we find merit in the Respondent's exceptions, reverse the judge, and dismiss the complaint.

Legal Analysis

There is a national labor policy that strongly favors deferring to arbitral decisions. *See Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960). That policy is firmly founded in Congressional command. *Gateway*

[1] The General Counsel's first and second exceptions seek to correct minor factual inaccuracies in the judge's decision. The Board finds merit in these exceptions and therefore modifies the judge's decision to reflect that the Respondent's place of business is Fernandina Beach, Florida, and to replace reference to Union President Carroll with Union President Chandler in the judge's discussion of whether the IBEW waived its right to bargain.

[2] The unions, collectively, represent about 80 employees at the container plant. Two of those employees comprise the Union's bargaining unit involved herein.

Coal Co. v. UMW, 414 U.S. 368, 377 (1974). Further, the Board has embraced that strong policy and has specifically found that the policies announced in the Steelworkers' Trilogy apply to the Board. *Olin Corp*., 268 NLRB 573, 579 (1984). As stated in *Collyer Insulated Wire*, 192 NLRB at 840:

> The Act, as has repeatedly been stated, is primarily designed to promote industrial peace and stability by encouraging the practice and procedure of collective bargaining. Experience has demonstrated that collective-bargaining agreements that provide for final and binding arbitration of grievances and disputes arising thereunder "as a substitute for industrial strife," contribute significantly to the attainment of this statutory objective.

Consistent with this policy, we find that deferral is warranted here.

The Board will defer to an arbitration award when the proceedings appear to have been fair and regular, all parties have agreed to be bound, and the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act. *See Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). Additionally, the arbitrator must have considered the unfair labor practice issue which is before the Board. In *Olin Corp.*, 268 NLRB 573 (1984), the Board clarified that an arbitrator has adequately considered the unfair labor practice issue if (1) the contractual issue is factually parallel to the unfair labor practice issue, (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice, and (3) the decision is susceptible to an interpretation consistent with the Act. Id. at 574. The party seeking to have the Board reject deferral bears the burden of proof. Id.

First, it is uncontested that the arbitral process here was fair and regular. In addition, the parties' agreement makes clear that both parties agreed to be bound by the arbitration process. Indeed, the Union sought arbitration of its grievance.

Next, we find that the arbitrator adequately considered the unfair labor practice issue. We agree with the Respondent that this case is controlled by *Dennison National Co.*, 296 NLRB 169 (1989). In *Dennison National*, the Board found the contractual issue factually parallel to the unfair labor practice issue where the arbitrator found that the employer's unilateral elimination of a job classification did not violate the parties' collective-bargaining agreement because the agreement's management-rights clause gave the employer the right to act unilaterally. The Board concluded that the issues were parallel because "[i]n an unfair labor practice proceeding on the merits of the statutory issue, the Board must consider whether the [employer]'s action constituted a unilateral change in violation of its bargaining obligation under Section 8(a)(5) of the Act. The presence of contractual authorization for the Respondent's action is determinative of the unfair labor practice allegation." Id. at 170–171.

As in *Dennison National*, the arbitrator here adequately addressed the statutory issue by determining the contractual issue. The statutory issue here is whether the Respondent's adoption of the new absence control policy constituted a unilateral change. The question of whether or not the management-rights clause of the parties' collective-bargaining agreement authorized the Respondent's implementation of the new policy is determinative of the unfair labor practice allegation here.[3] Further, that was the precise argument that the Respondent presented to the arbitrator, i.e., that its actions were privileged under article XVI, the contractual management-rights clause. Concededly, the Respondent may have also argued, and the arbitrator may have found, the further point that the Respondent's actions were privileged by assertedly inherent management rights. However, as discussed below, it is not clear that the arbitral result rested solely on any such finding. Rather, contrary to the judge and our dissenting colleague, we find a reasonable interpretation of the arbitrator's decision is that the management-rights clause authorized the implementation of the absence control policy, as discussed in greater detail below. Indeed, the arbitrator concluded that that the agreement gave the Respondent the right to make rules as long as they did not conflict with any provision of the agreement. He found no such conflict. Accordingly, we find that the arbitrator adequately considered the relevant unfair labor practice issue.

We also conclude that the parties presented the arbitrator generally with the facts relevant to resolving the unfair labor practice issue. Indeed, the General Counsel does not allege that the arbitrator lacked an adequate factual basis to decide the relevant issues.

Finally, contrary to the judge and our dissenting colleague, we find that the arbitrator's decision is not clearly repugnant to the purposes and policies of the Act. The standard for determining whether an arbitral decision is clearly repugnant is whether it is "susceptible" to an interpretation consistent with the Act. *Olin*, 268 NLRB at

[3] Sec. XVI of the agreement provided that "[t]he parties recognize that the operation of the plant and the direction of the work force therein is the sole responsibility of the Company. Such responsibility includes, among other things, the full right to assign work, to discharge, discipline, or suspend for just cause, and the right to hire, transfer, promote, demote, or layoff employees because of lack of work or for other legitimate reasons."

574; *see The Motor Convoy*, 303 NLRB 135 (1991). "Susceptible to an interpretation consistent with the Act" means precisely what it says. Even if there is one interpretation that would be inconsistent with the Act, the arbitral opinion passes muster if there is another interpretation that would be consistent with the Act. Further, "consistent with the Act" does not mean that the Board would necessarily reach the same result. It means only that the arbitral result is within the broad parameters of the Act. Thus, the Board's mere disagreement with the arbitrator's conclusion would be an insufficient basis for the Board to decline to defer to the arbitrator's award. *See Anderson Sand & Gravel*, 277 NLRB 1204, 1205 (1985). The Board, moreover, will not find an imperfectly drafted arbitral decision clearly repugnant, provided that a reasonable interpretation of the award is consistent with the Act. *See Yellow Freight System*, 337 NLRB 568, 572 (2002) (Board deferred to arbitral award where wording of award was somewhat ambiguous, but could be reasonably interpreted to support a finding consistent with the Act); *see also Specialized Distribution Managment*, 318 NLRB 158, 163 (1995) (deferral not repugnant to the Act even where arbitrator's "approach and style are at variance from the standards the General Counsel would like to see").

Concededly, the arbitrator's decision here is not a model of clarity. Further, certain statements in the award arguably are not expressly tied to the management-rights clause. However, "the arbitrator's decision must be read in its entirety to fairly determine its meaning." *Doerfer Engineering*, 315 NLRB 1137, 1139 (1994), enf. denied on other grounds 79 F.3d 101 (8th Cir. 1996). Taken as a whole, we find that the arbitrator's decision satisfies the Board's deferral standard, i.e., it is at least susceptible to the interpretation that it was based on his construction of the management-rights clause.

In his decision, the arbitrator initiated his analysis with a discussion of the management-rights clause and quoted the clause in its entirety. After quoting the clause, he concluded that "it is the right of the Company to make the rules." Thus, an interpretation of the arbitral opinion is that the management-rights clause gave the Respondent the right to act, as distinguished from an opinion which would say that there is an inherent right to act.[4] Because, as discussed above, a finding that the Respondent did not act unlawfully because its conduct was sanctioned by the management-rights clause is consistent with the Act, the arbitrator's award is not clearly repugnant. We are supported in our conclusion that the award is not clearly repugnant by the fact that the General Counsel bore the burden of proving that the arbitrator did not rely upon the management rights clause. We find that the General Counsel failed to carry his burden.

Contrary to the judge and our dissenting colleague, we find *Columbian Chemicals Co.*, 307 NLRB 592 (1992), enfd. mem. 993 F.2d 1536 (4th Cir. 1992), distinguishable. In *Columbian Chemicals*, the Board found deferral to an arbitral award unwarranted as clearly repugnant where the arbitrator based his decision on "a basic management prerogative." Id. at 592 fn. 1. Indeed, the Board there expressly found that the arbitrator did not rely on the management rights clause. Id. In fact, in *Columbian Chemicals*, the employer did not even rely on the management rights clause. Id. at 594. Thus, in *Columbian Chemicals*, the arbitrator's decision was so clearly wedded to his extra-contractual theory of management prerogatives that it was not susceptible to an interpretation consistent with the Act.

Here, although the arbitrator discussed his opinion of the theory that management enjoys certain inherent rights, his analysis does not compel a finding that such a discussion was a necessary basis for his award. Unlike in *Columbian Chemicals*, the Respondent here clearly relied upon the management-rights clause in arguing to the arbitrator and, as discussed above, the arbitrator asserted that the management-rights clause gave the Respondent the right to make rules.[5] We conclude, therefore, that the arbitrator's decision is susceptible to the interpretation that he relied upon the management-rights clause and is not dependent on an inherent management prerogative theory. As such, it is not clearly repugnant to the Act.

---

[4] The General Counsel also argues that the arbitrator's decision is clearly repugnant because the arbitrator did not find that the management rights clause constituted a clear and unmistakable waiver of the Union's right to bargain over the absentee policy. We note that the Respondent in its brief in support of exceptions disclaimed any argument that the Union contractually waived its right to bargain. Rather, as discussed above, the Respondent argued, and the arbitrator found, that a reasonable interpretation of the contract is that the management rights-clause authorized the Respondent to promulgate the absentee control policy. Moreover, the Board has consistently found that an arbitral award "can be susceptible to the interpretation that the arbitrator found a waiver even if the arbitral award does not speak in [terms of clear and unmistakable waiver]." *Southern California Edison*, 310 NLRB 1229, 1231 (1993); see also *Olin*, 268 NLRB at 576 (arbitral decision not clearly repugnant where decision was reasonable, even though arbitrator did not apply statutory waiver standard). Finally, the waiver test is not the only reasonable interpretation of the Act. See *NLRB v. Postal Service*, 8 F.3d 832, 837–838 (D.C. Cir. 1993).

[5] For these reasons, we also find the judge's reliance on *Kohler Mix Specialties*, 332 NLRB 630 (2000), misplaced. In *Kohler Mix Specialties*, the arbitrator found that the parties' collective-bargaining agreement did not prohibit the employer's unilateral conduct. Here, in contrast, the arbitrator found that the parties' management rights clause *permitted* the conduct at issue.

Our dissenting colleague rests the complete weight of her contention (that deferral to arbitration is inappropriate) on the arbitrator's discussion of the inherent management rights theory. Her narrow focus displays a disregard for the Board's strong policy in favor of deferral and the consequences of that policy. As discussed above, because the Board strongly favors deferral as a means of promoting industrial peace and the parties' autonomy, the Board puts the burden on the party seeking to avoid deferral to prove that the arbitrator's decision is not even *susceptible* to an interpretation consistent with the Act. Thus, the dissent's position can prevail only if the Board were to find that the General Counsel has proven that every reasonable interpretation of the arbitrator's decision is repugnant to the Act.

Our dissenting colleague makes clear that she finds the arbitrator's discussion of an inherent management-rights theory repugnant to the Act. Indeed, as discussed above, we might agree that had that been the only basis for the arbitrator's decision, deferral would be inappropriate. Our dissenting colleague's easy dismissal of every other interpretation, however, is not compelling. She does not dispute that (1) the Respondent argued to the arbitrator that the management-rights clause privileged it to unilaterally implement the new attendance control policy; (2) the arbitrator referred to the Respondent's argument; (3) the arbitrator prominently quoted the management-rights clause; and (4) the arbitrator immediately followed his quotation of the management-rights clause with the assertion that the Respondent had the right to make rules. We find that a reasonable interpretation of the arbitrator's decision is that he found that the management-rights clause's reference to the Respondent's right to direct the work force included the right to set an attendance control policy. Indeed, the attendance control policy directed the employees as to when and how often they were obligated to attend work. Clearly, the General Counsel, who bears the burden of establishing that the arbitral award is not susceptible to this interpretation, has not done so.

Our dissenting colleague's narrow focus also explains why she fails to see how *Columbian Chemicals* is distinguishable from the instant case. She focuses only on the discussion in both arbitral decisions of the inherent management-rights theory. She ignores, however, that, as discussed above, in *Columbian Chemicals* that is the *only* theory discussed, whereas the arbitral decision here is at least susceptible to the interpretation that the arbitrator addressed both a contractually based theory and the inherent rights theory.

The dissent's narrow focus similarly leads to her erroneous conclusion that *Dennison National* is distinguishable in a meaningful way. Although in *Dennison National* the arbitrator did not discuss an inherent rights theory, in both cases the arbitrators relied, at least in part, on an interpretation of a broadly worded management-rights clause to find permissible the employer's unilateral action[6]. If the Board's precedent required that every interpretation of the arbitrator's decision be consistent with the Act, the dissent's distinction would make a difference. Because, however, deferral is required as long as the arbitral decision is susceptible to *an* interpretation consistent with the Act, the dissent's distinction is irrelevant.

Accordingly, we find that the General Counsel has not shown that the statutory and contractual issues are factually dissimilar or that facts generally relevant to the unfair labor issue were withheld from the arbitrator. Additionally, the General Counsel failed to show that the arbitrator's award is clearly repugnant to the Act. Thus, we shall defer to the grievance arbitration award and dismiss the complaint in its entirety.[7]

ORDER

The National Labor Relations Board reverses the recommended Order of the administrative law judge and dismisses the complaint in its entirety.

Dated, Washington, D.C. May 16, 2005

Robert J. Battista , Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting.

The majority strains to find an excuse to defer to the arbitrator's decision here, which it concedes is "not a model of clarity." In fact, that decision is not susceptible

[6] Contrary to our dissenting colleague, we do not find the arbitrator's interpretation of the management-rights clause to be outside the parameters of the Act, so as to render deferral inappropriate. It has long been Board policy to "defer[] to arbitration decisions which find that language in a general management-rights clause authorizes unilateral changes in terms and conditions of employment by an employer." *Southern California Edison Co.*, 310 NLRB 1229, 1231 (1993).

Our colleague concedes that an arbitral award is not made repugnant by the fact that the arbitrator has chosen not to apply the "clear and unmistakable waiver" standard.

[7] In light of our deferral to the arbitration award, it is unnecessary for us to reach the General Counsel's contention that the judge erred in finding that the Respondent violated Sec. 8(a)(5) without also finding that the Respondent violated Sec. 8(d).

to an interpretation consistent with the Act. The arbitrator invoked a theory of inherent management rights, under which the Respondent was privileged to unilaterally impose a new attendance policy on employees (a mandatory subject of bargaining under the Act), unless the collective-bargaining agreement affirmatively required bargaining with the Union. This approach is the exact opposite of what Section 8(a)(5) of the Act requires. Not surprisingly, the Board refuses to defer to arbitration decisions predicated on such theories. But even if the arbitrator's decision could fairly be regarded as an interpretation of the agreement's management-rights clause, deferral would still be unwarranted. And deferral aside, the statutory violation in this case was established.

I.

The majority's opinion sets out the relevant factual and procedural background: Over the Union's objections, the Respondent unilaterally implemented a new attendance control policy. The Union filed a grievance, which the Respondent denied, asserting that the "establishment of reasonable rules and policies rest exclusively with management." The arbitrator upheld the Respondent's action, but the Board's administrative law judge declined to defer to the arbitration award and found that the Respondent had violated its duty to bargain in good faith under Section 8(a)(5) of the Act.

As I will explain, the judge was correct, starting with her refusal to defer. This case turns on how the arbitrator explained his ruling, and so the operative portion of his decision, which follows a quotation of the collective-bargaining agreement's management-rights clause,[8] is worth quoting at length:

> *Simplistically stated, it is the right of the Company to make the rules*, and it is the right of the Union to grieve those rules if, in its view, it conflicts with any provision of the Collective Bargaining Agreement. As Mr. Lawrimore [an official of the Respondent] *properly stated* at the hearing, "Without rules we cannot do any of those things (set forth in Article XVI), and *it is obviously always a Management's inherent right to make the rules*."
>
> What this case really comes down to is whether or not, going back as far as 1979, the Company negotiated the Absentee Attendance Policy with the Union or did the Company, in fact, simply promulgate an absentee policy, not negotiated with the Union but, of course, asked for and received Union input. Quite clearly, over all of the years, . . . the Absentee Policy was never the subject of negotiations. It was only when the "new" Management team . . . sought to make changes in the policy that the Union grieved, and that the instant proceeding then ensued.
>
> Arbitrator Goldstein, who had a similar question put before him ... opined that "The promulgation of an attendance policy, designed as it is to control absenteeism, is viewed as a *fundamental management right which is to be presumed to be inherent in the management role absent specific agreement otherwise." I wholeheartedly agree with that statement.* Indeed, it is really incumbent upon Management to have such policies since it is a means of ensuring that employees come to work regularly and on time. To be sure, however, Unions may grieve specific applications of policies that they deem to be onerous, unfair, lacking in specificity or the like. Managements act and Unions react. Could a company negotiate an absentee policy with a Union? The answer to that query is, of course, in the affirmative. *However, in my understanding, there is no requirement that it do so, absent some contractual requirement not present in the instant case.* Simply put then, I find that there has been no contractual breach, so that the grievance must be denied. [Emphasis added in part; some emphasis in original omitted].

II.

There is no dispute about the correct legal standard to apply. Under *Olin Corp.*, 268 NLRB 573 (1984), the Board defers to an arbitrator's decision where the arbitrator has adequately considered the unfair labor practice at issue and his decision is not clearly repugnant to the Act, i.e., not "palpably wrong" or not "susceptible to an interpretation consistent with the Act." It is well established, in turn, that the Board will *not* defer to an arbitration decision that is based on the premise of an unrestricted "inherent" or "basic" management right to act unilaterally.[9] Similarly, the Board has refused to defer to arbitration awards premised on the theory that an employer's unilateral change in a term of employment is permissible unless the change is specifically prohibited by the parties' contract (rather than being affirmatively author-

[8] Art. XVI, the contract's management-rights clause, provided:

> The operation of the plant and the direction of the work force therein is the sole responsibility of the company. Such responsibility includes, among other things, the full right to assign work, to discharge, discipline, or suspend for just cause, and the right to hire, transfer, promote, demote, or layoff employees because of lack of work or for other legitimate reasons.

[9] *Columbian Chemicals Co.*, 307 NLRB 592, 592 fn.1 (1992), enfd. mem. 993 F.3d 1536 (4th Cir. 1992); *Motor Convoy*, 303 NLRB 135, fn. 6 (1991). See also *Ciba-Geigy Pharmaceuticals*, 264 NLRB 1013, 1016 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983).

ized).[10] Deferral thus is improper in this case, despite the majority's efforts to salvage it by insisting that the arbitrator relied on the contract's management-rights clause and interpreted that clause in a permissible way.

Any fair reading of the arbitrator's decision (already quoted extensively) demonstrates that his analysis was based on a theory of inherent management rights, which privileges the employer to act unilaterally, unless a collective-bargaining agreement *restricts* those rights. Thus the arbitrator:

> (1) observed that "it is the right of the Company to make the rules;"
>
> (2) quoted with approval the testimony of a company witness that "it is obviously always a Management's inherent right to make the rules;"
>
> (3) stated that he "wholeheartedly agree[d]" with an earlier arbitrator's statement that "[t]he promulgation of an attendance policy . . . is viewed as a fundamental management right which is presumed to be inherent in the management role absent specific agreement otherwise;"
>
> (4) expressed the view that "there is no requirement" that an employer bargain over imposition of an attendance policy "absent some contractual requirement;" and finally
>
> (5) found "no contractual breach," in the absence of a contractual requirement to bargain with the Union.

To say, as the majority does, that "certain statements in the award arguably are not expressly tied to the management rights clause" is something of an understatement. Without reference to a theory of inherent management rights, the arbitrator's decision would have no rationale at all.

The Board's decision in *Columbian Chemicals Co.*, supra fn. 2, is directly on point. In that case, the Board affirmed the decision of an administrative law judge refusing to defer to an arbitration award and finding that the employer's unilateral change in its attendance policy violated Section 8(a)(5). As the *Columbian Chemicals* Board explained, the arbitrator there

> found that there was a "basic management prerogative" to take the action. He then found nothing in the contract to *take away* that prerogative. In these circumstances, it is clear that the arbitrator did not rely on the management-rights clause to find the managerial prerogative.

307 NLRB at 592 fn. 1 (emphasis in original). The Board accordingly adopted the judge's decision describing the arbitrator's approach as "wholly at odds . . . with the National Labor Relations Act, which *prohibits* unilateral employer action unless the employer has secured from the union a waiver of its right to bargain about such matters." Id. at 595 (emphasis in original).

I see no way to distinguish *Columbian Chemicals*. Contrary to the majority's view, the arbitrator here did not, in any real sense, interpret the management-rights clause, as the Board's case law requires. Merely quoting the clause is not enough. And certainly the arbitrator did not interpret the clause independent of the inherent management-rights theory that permeates his decision. Indeed, the arbitrator's reliance on that theory explains why he made no attempt to explain how the language of management-rights clause could be read to affirmatively authorize unilateral employer action (as the Board's law demands).

This case is easily distinguishable, then, from the decision on which the majority relies, *Dennison National Co.*, 296 NLRB 169 (1989).[11] There, the arbitrator undisputedly interpreted the parties' collective-bargaining agreement, concluding that its management-rights clause granted the employer the right to act unilaterally with respect to the elimination of a job classification. Notably, the *Dennison National* Board itself distinguished *Armour & Co.*, 280 NLRB 824 (1986), where deferral was rejected because the arbitrator (like the arbitrator here) "merely determined that 'nothing in the contract' prohibited the respondent from taking the unilateral action in question." 296 NLRB at 170 fn. 6.

III.

Even if the arbitrator's invocation of the inherent management-rights theory could be cordoned off as dicta (as the majority would do), and his decision viewed as purely an interpretation of the agreement's management-rights clause, deferral would still be unwarranted. The majority asserts—three times—that my focus is "narrow." Triple emphasis does not make it so.

I agree, of course, with the majority's observation that "'consistent with the Act' does not mean that the Board would necessarily reach the same result," but rather "only that the arbitral result is within the broad parameters of the Act." Here, however, the arbitral decision, treated as interpretation of the management-rights clause, falls outside the "broad parameters of the Act."

[10] See *Kohler Mix Specialties*, 332 NLRB 630, 631 (2000); *Haddon Craftsmen*, 300 NLRB 789, 790 fn. 5 (1990), enfd. mem. 937 F.2d 597 (3d Cir. 1991); *Armour & Co.*, 280 NLRB 824, 824 fn. 2 (1986).

[11] I take no position on whether *Dennison National* was correctly decided. As commentators have pointed out, the Board's decisions involving deferral to arbitration in refusal-to-bargain cases seem "less than consistent." See Robert A. Gorman & Matthew W. Finkin, *Basic Text on Labor Law* §31.5 at 1039 (2d ed. 2004).

Under well-established Board law, that clause may not even arguably be interpreted as waiving the Union's right to bargain over a change in the attendance policy. See generally *Johnson-Bateman Co.*, 295 NLRB 180, 184–185 (1989). The clause makes no reference to attendance or to the employer's right to establish rules or policies of any sort, nor does the clause assert that management retains the authority to act unilaterally except as limited by the parties' agreement. Compare *Dennison National Co.*, supra, 296 NLRB at 170 fn. 5 (deferring to arbitration where management-rights clause authorized unilateral action "except as subject to the provisions of this contract"). Although the Board has not demanded that arbitrators apply its own "clear and unmistakable waiver" standard, the Board nevertheless "will determine whether a particular award is 'clearly repugnant to the Act' by reviewing all the circumstances, including the contractual language . . . ." *Southern California Edison Co.*, 310 NLRB 1229, 1231 (1993) (deferring to arbitrator's decision that contract clause authorizing promulgation of safety rules authorized unilateral implementation of drug-testing requirement).

IV.

With no basis for deferring to the arbitration decision, the Board should reach the merits and find a violation of Section 8(a)(5), essentially for the reasons the judge did. Instead, the majority's decision permits a violation of the Act to go unremedied, based on an arbitrator's decision with a premise antithetical to the Act. If there is a narrow focus in this case, it is the majority's eagerness to defer, rather than enforce the statutory duty to bargain. The result represents exactly the abdication of responsibility that the Board had resolved to avoid, even while adopting a liberal policy of deferral. See *United Technologies Corp.*, 268 NLRB 557, 560 (1984). Accordingly, I dissent.

Dated, Washington, D.C., May 16, 2005

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

Jermaine A. Walker, Esq., for the General Counsel.
Thomas M. Hanna, Esq., for the Respondent.
David Carroll, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. The International Brotherhood of Electrical Workers, Local No. 1924, AFL–CIO (the IBEW) filed the original charge on April 24, 2000,[1] and an amended charge on January 15, 2003. On January 27, 2003, the Regional Director for Region 12 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing. Based upon the allegations contained in the charge and amended charge, the complaint alleges that Smurfit-Stone Container Corporation, Container Division (Respondent) failed to continue in effect all the terms and conditions of the collective-bargaining agreement between the IBEW and Respondent and implemented a new absentee policy program without bargaining with the IBEW.

I heard this case in Jacksonville, Florida, on July 23 2003. the General Counsel and the Respondent submitted posthearing briefs, which I have considered. On the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Delaware corporation, is engaged in the nonretail business of manufacturing containers at its facility in Fernandina Beach, Florida, where it annually sells and ships goods valued in excess of $50,000 directly to points outside the State of Florida. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the IBEW is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. General Background

In its business operation, Respondent converts paper received from various paper mills into corrugated boxes. Respondent's Fernandina Beach property contains both the container or box plant as well as a mill plant. While the mill plant and the container plant are physically located on the same property and are adjoining buildings, they are in separate divisions and are controlled by totally separate management. Operations Manager Russell Lawrimore testified that while he has maintained an office at the Fernandina Beach location since 1999, he has never physically been inside the mill plant.

During all relevant time periods, three separate unions have represented the employees at Respondent's container plant. As of July 2003, Respondent employed approximately 78 hourly employees at the Fernandina container plant. Seventy of the employees are represented by the International Union of Paperworkers or PACE. The International Association of Machinists and Aerospace Workers, AFL–CIO (the IAM), represents 6 of the 78 employees. The remaining two hourly employees are represented by the IBEW. In March 2000, the IBEW unit consisted of employees Kyle Trigg and Shawn Kirby, with Trigg serving as the unit's shop steward. During this same time period, Chris Chandler was the president of the IBEW local and Wayne Teaster was the vice president. James Gill served as the recording secretary. In December 2000, David Carroll succeeded Chandler as president of the Union.

[1] All dates are 2000 unless otherwise indicated.

For the period of time from February 2002 to October 2002 and from January 2003 until mid June 2003, there was only one employee in the bargaining unit represented by the IBEW.

B. Respondent's Attendance Policy

In 1986, Respondent acquired Container Corporation of America, which maintained a facility in Fernandina Beach, Florida. Robert Hardie, who serves as Respondent's Director of human resources for the Container Division, has been employed by either Respondent or its predecessor for 37 years. In the early 1970's, Container Corporation of America, herein CCA, experienced an EEOC charge at its Greensboro carton plant that was subsequently lost as a result of the attendance program at that particular plant. Hardie testified that CCA's labor relations department analyzed the case and determined that a standardized absentee program was needed throughout CCA's manufacturing facilities. As CCA's regional employee relations manager at that time, Hardie was responsible for implementing the new attendance policy. Hardie testified that after presenting the new policy to the Fernandina Beach management team, he and the management team met with the representatives of the three unions that represented the employees at that time. Hardie asserted that while he informed the representatives that the plan would go into effect in 1979, he neither offered to negotiate nor did he negotiate the plan with the IBEW. To his recollection, no grievances or unfair labor practices were filed by the IBEW with respect to this new attendance policy. Hardie testified that the original attendance policy was virtually a "no fault program" that did not allow an absence to be excused with a doctor's statement.

C. 1984 Collective Bargaining

In 1984 Hardie participated in bargaining with the three Unions at the Fernandina Beach plant. He testified that the attendance policy was never brought up during the 1984 negotiations. Carol Floyd Chapin (Floyd), who served as Respondent's assistant to the general manager, worked at the Fernandina Beach plant from 1976 until her retirement in 2002. In 1984, her responsibilities were expanded to include personnel and human resources. She identified Respondent's 1979 attendance policy as the policy in effect when she assumed the additional human resource duties in 1984. Respondent admits however, that sometime between its initial promulgation in 1979 and 1984, there was a change to the policy in which absences resulting from illness or accident, supported by a doctor's statement, would not be counted as an absence under the policy. Neither Respondent nor the IBEW presented evidence as to how this change in the policy came about.

Floyd participated in the 1984 collective-bargaining negotiations by taking notes for Respondent during the bargaining sessions. She testified that upon review of the 1984 bargaining notes, she found that the IBEW made no demands to change the existing attendance policy. She confirmed that prior to the beginning of the 1984 negotiations, PACE sought the elimination of the attendance policy. PACE however, eventually dropped this demand prior to the completion of the negotiations. Floyd also confirmed that she attended negotiations between 1984 and 2002 as a member of Respondent's negotiating team and that she was responsible for making and keeping notes of the sessions. She recalled that during this time period, no union attempted to negotiate with Respondent concerning the attendance policy. Floyd further testified that following 1984, Respondent made revisions to certain plant and safety rules and that such revisions were unilaterally promulgated by Respondent and were not the subject of negotiations with any union.

D. The March 2000 Change in the Attendance Policy

Lawrimore testified that by letter dated February 26, 2000, he notified IBEW President Chris Chandler, as well as the presidents of the other two Unions, that Respondent was going to implement a new absentee policy program effective March 15, 2000. Larwrimore's letter further added: "We will meet to discuss any concerns that you may have." The letter contained an attachment with the anticipated changes in the attendance policy. The new policy set out a system for assigning points for employees' absences or tardiness. All absences or tardys were assigned points with the exception of preapproved vacation time, jury duty, mandatory military duty, funeral leave, worker's comp time off, court appearances under a subpoena for civic responsibility, and absences under the Family Medical Leave Act. The new policy also set forth the discipline to be administered as based upon the employee's accumulated points.

Lawrimore recalled that after sending the letters, he neither received responses nor requests to bargain from any of the Unions. After receiving no response, Lawrimore contacted Pace's President and the shop stewards for the IAM and the IBEW and scheduled a meeting to discuss the changes in the attendance policy. The meeting was held on March 7 and attended by PACE's president and another Pace representative, IAM's shop steward, as well as Respondent's general manager, Dennis Weir, Floyd, and Lawrimore. No representative from the IBEW attended the meeting. Trigg recalled that when asked to attend the meeting, he told Lawrimore that he had no authority to discuss changes to the attendance policy and that Lawrimore would have to speak with Union President Chandler. Lawrimore acknowledged that he did not attempt to contact Union President Chandler or to invite him to the March 7 meeting.[2] Lawrimore submitted his notes from the meeting with IAM and PACE and he recalled that PACE President Brown inquired what would happen under the new policy if employees were required to work 60 or 70 consecutive days without a scheduled day off. Lawrimore explained that while he had never experienced this occurring in the past, he understood Brown's question. Lawrimore testified that following this meeting; Respondent changed the policy to add a two-point credit for employees who work a calendar month without a day off. Additionally, item 4 in the" notification" section was eliminated and "disciplinary layoff" was added as another item under the "No Points will be assessed" section. While he had no notes for confirmation, he testified that it was his belief that these additional changes were at the request of the unions.

[2] Lawrimore testified that when he schedules monthly labor/management meetings, he usually asks PACE's president and the union stewards from the two trade unions to the meeting.

Union Steward Trigg testified that the first time that he saw a copy of the new attendance policy was on March 8. Trigg recalled that Lawrimore gave him a copy to give to IBEW President Chris Chandler. After receiving the copy of the policy, Trigg met with Chandler the next day and they discussed the various differences between the new policy and the existing collective bargaining agreement. Trigg explained that while doctor's notes were accepted under the "justifiable cause" section of the existing collective-bargaining agreement, the new attendance policy eliminated the application of the doctor's note. The new attendance policy allowed excused absences only for preapproved vacation time, jury duty, mandatory military duty, funeral leave, workers' comp time off, FMLA, court appearances under a subpoena for civic responsibility, and disciplinary layoff. Article IX of the collective-bargaining agreement however, provides that an employee "shall be considered absent for justifiable cause" if he is so sick that he is unable to report for work and is able to prove such sickness or if the sickness or death of some member of his family makes his attendance impossible, and he is able to prove such sickness or death. Article IV, section 8 of the agreement also provides that an employee absent on one of his regularly scheduled workdays during the week shall not receive Sunday overtime pay unless the absence was for "justifiable cause" as defined in article IX. Article VII, section 2 further provides that "If an employee is scheduled to work on any such holidays [As listed in sec. 1] and fails to report without justifiable cause, as defined in Article IX, he shall not receive such holiday pay." Trigg also pointed out that the new attendance policy provides that an employee who cannot be present for the regularly scheduled work period is required to notify Respondent at least 4 hours in advance by calling the main gate security office. Article XVII of the collective-bargaining agreement requires the employee to give notification of his inability to report for duty at least 4 hours before his tour, except where circumstances beyond the employee's control prevents him from giving such notice. In those instances, the employee is required to give notice to his foreman as soon as possible.

Union President Christopher Chandler testified that prior to the implementation of the new attendance policy on March 15, he requested that Lawrimore meet with him to discuss the policy.[3] Chandler further testified that he told Lawrimore that he would be willing to sit down and negotiate an attendance policy with him at any time and Lawrimore refused. Chandler did not identify the date or the circumstances in which this request was made to Lawrimore. He further recalled that while he was out of town, he received a telephone call from Vice President Wayne Teaster, advising him that Respondent desired to meet with the Union. Chandler advised Teaster to meet with Respondent.

Teaster recalled that Gill, Trigg, and he met with management representatives Lawrimore, Dwayne Lott, and Dennis Weir on March 13. Teaster could not recall if Respondent or the IBEW initiated meeting. He only recalled that Chandler had been out of town and had asked him to fill in for him in the meeting. During the meeting, Trigg pointed out that the new attendance policy conflicted with the collective-bargaining agreement. Teaster also recalled that he told Lawrimore that the new attendance policy was a unilateral change and a matter of bargaining and that the IBEW wanted to bargain about the policy. Teaster testified that Lawrimore stated that the policy was a matter of company policy and Respondent did not have to bargain concerning the policy. Trigg recalled Weir's stating that the policy was a standard absentee policy and Respondent was going to implement the policy on March 15. Trigg testified that while Respondent would not agree to his tape-recording the meeting, he took written notes. The notes reflect that Trigg brought up the various portions of the policy that the IBEW asserted to be in conflict with the existing bargaining agreement. Trigg noted that Weir told the union representatives that while Respondent would not bargain about the policy, Respondent would consider any points that the Union might have.

Lawrimore recalled that during the meeting with the IBEW, he asked Teaster if there was anything in specific about the policy that he didn't like and which could be worked through as they had done with the other unions. Lawrimore testified that Teaster did not discuss any specific problems with the policy but stated that he was not in a position to negotiate or bargain about the attendance policy and that Respondent could not implement the policy without bargaining with the Union. Lawrimore admitted that during the meeting, he told Teaster that Respondent was not going to negotiate the policy.

On March 15, the new attendance policy was implemented. All of the employees' attendance records were wiped clean and employees were placed at zero points. On March 28, the IBEW filed a grievance, asserting that the attendance policy was in conflict with the existing agreement and past practice.[4] On May 5, Trigg received a verbal warning under the new attendance policy and the IBEW filed a grievance on May 11.[5] On June 13, Regional Employee Relations Manager Michael Williams sent letters to the local presidents of both IAM and IBEW, denying the respective grievances. Williams referenced a discussion with both presidents on June 5. The letters are identical and Williams included the following as a part of his letter:

> As we discussed, it is the Company's view that establishment of reasonable rules and policies rest exclusively with management. The attendance policy, in our opinion, meets such criteria. This policy change reinforces the needs to have employees report when scheduled on a regular basis. Further, it is our belief that Article IX, Justifiable Cause, only relates to an employee's absence in relation to Holiday Pay. It does not

[3] Although Chandler testified that he requested bargaining concerning the new attendance policy, he never acknowledged when he first learned of the proposed changes. He neither confirmed nor denied that he received Lawrimore's February 26, 2000 letter.

[4] On March 22, IAM filed a grievance based upon Respondent's failure to negotiate the attendance policy. The grievance was later abandoned.

[5] Trigg was terminated for the second time under the new attendance policy on December 5 and the IBEW filed a grievance regarding his termination.

excuse an absence under the previous or present attendance policy.

No grievance was filed by PACE. Lawrimore testified without contradiction that the IAM pursued the grievance only to the third step.

E. 2001 Changes to the Attendance Policy

Lawrimore testified that at some point during 2001, some of the PACE representatives told him that they had issues with the attendance policy that they wanted to discuss. Lawrimore scheduled a meeting and invited PACE representatives as well as the IBEW and IAM shop stewards. Lawrimore explained that the PACE local is unique to the container plant as its officers are physically in the plant. There is a separate PACE local for the employees in the mill plant. In contrast, the IAM and the IBEW locals represent employees in both the container plant and the mill plant. Lawrimore testified that he had not invited the IBEW's president or vice president because it was customary to invite the shop stewards for IAM and the IBEW when they were talking about changes that only affected the container plant. Lawrimore testified that prior to the meeting he talked with Shop Steward Trigg and told him that the meeting was to review the attendance policy. Lawrimore maintained that Trigg responded by stating that there was a grievance pending and he was not in a position to negotiate. PACE President Brown and the IAM union steward attended the meeting. Neither Trigg nor any other IBEW representative attended the meeting. The PACE and IAM representatives brought up four specific concerns with respect to the program. Lawrimore recalled that PACE suggested that the "calendar month" assessment period should be changed to a "thirty day" period. Additionally, the PACE representative wanted to add "Union Business" as an absence for which no points would be assessed and wanted changes in the "court appearance" language portion of the policy. The IAM representative proposed the inclusion of an incentive program to reward those employees who report timely to work. Lawrimore testified that on September 25, 2001, the attendance policy was amended. In response to the unions' suggestions, the assessment period was changed to a 5-week revolving period and "Prearranged Union Business" was added as an absence for which no points would be assessed. No changes were made in the court appearance language.

On October 4, 2001, IBEW President Carroll sent an e-mail message to Respondent concerning the September 25, 2001 changes. Carroll explained that the IBEW had heard that Respondent had changed the attendance policy again, however the Union had not been involved in either attendance policy change. Carroll reminded Respondent that there was an outstanding grievance concerning the first attendance policy changes and stated that the IBEW strongly contends that it must be involved beforehand in any changes that affect employment.

F. The Arbitration

After filing its March 28, 2000 grievance concerning the change in the attendance policy, the IBEW also filed the underlying unfair labor practice charge in this matter on April 24, 2000. The charge was subsequently deferred to the grievance/arbitration procedure under the Board's deferral policy.[6] In his June 3, 2002 award, the arbitrator stated that the IBEW identified the issue as "Did the Company violated the Collective Bargaining Agreement when they unilaterally changed the Attendance Policy effect March 15, 2000." The arbitrator also explained that issues sought to be resolved by Respondent dealt with whether the contract restricted the right to establish reasonable rules of conduct, whether the contract required Respondent to negotiate with the IBEW before implementing the changes, and whether the IBEW waived any right to negotiate. Despite the issues articulated by the parties, the arbitrator framed the issue before him as "what shall be the disposition of the grievance."

G. 2002 Collective Bargaining

The 1998 collective-bargaining agreement between the IBEW and Respondent provided that the agreement would remain in effect until July 15, 2003, and was self-renewing for yearly periods thereafter unless either party provided written notice of intent to modify the agreement. In 2002, Respondent proposed to each Union an extension of the existing collective-bargaining agreements to 2008. Regional Employee Relations Manager William Lavin recalled that he prepared a memorandum of agreement that provided for an extension of the agreements primarily with respect to economic items. Lavin met first with PACE and then with the IAM and the IBEW. Respondent provided bargaining notes from its meetings with the union beginning on July 30, 2002. Lavin testified that when he spoke with the unions, he told them that Respondent was proposing a 5-year extension that was primarily economic in nature. He recalled that he told the Unions that if they had any "burning issues" and they wanted to talk about some language item or "whatever", Respondent would be glad to listen. Lavin recalled that on August 8 2002, he and the management team initially met individually with the three Unions and then later collectively with the representatives of all three Unions to determine if there were any additional questions. Lavin testified that Respondent's proposed agreement extension was accepted by the IBEW. None of the Unions requested any language changes in the existing agreement. The only language change was proposed by Respondent and dealt with the transfer clause. An agreement was reached with the IAM and the IBEW and the terms of that agreement were included in a separate letter of agreement rather than included in the full collective-bargaining agreement. Lavin testified that there was no discussion of the attendance policy during the August 2002 negotiations.

Floyd testified that she also took notes during the 2002 negotiations with the Unions. Floyd's notes reflect that during the first bargaining session, the PACE representative raised the issue of the attendance policy and inquired as to whether there would be additional changes. Respondent's representative responded that the policy was a management prerogative and while no additional changes were foreseen, Respondent reserved the right to change if there was a business necessity. Respondent's bargaining notes from the August 8 meeting with

[6] *Collyer Insulated Wire*, 192 NLRB 837 (1971).

the IBEW reflect no discussion concerning the attendance policy.

III. FACTUAL AND LEGAL CONCLUSIONS

A. Whether Respondent Unilaterally Modified the Collective-Bargaining Agreement

Respondent does not dispute that it implemented the change in the attendance policy without bargaining with the IBEW. Respondent contends however, that it was authorized to do so by virtue of the management-rights clause and further argues that the IBEW has waived its right to bargain over the changes made in the attendance policy.

Generally, an employer whose employees are represented by a union may not unilaterally change the represented employees' terms and conditions of employment without first giving the union notice and an opportunity to bargain over the proposed changes. *NLRB v. Katz*, 369 U.S. 736 (1962). While an employer may propose midterm modifications of a collective-bargaining agreement, a union is not obligated to agree to the changes or even to bargain about them during the contract term. *Mohawk Liqueur Co.*, 300 NLRB 1075, 1083 (1990). Further, when an employer repudiates a collective-bargaining agreement by modifying terms which involve a subject of mandatory bargaining, it is within the Board's authority to deem such modification a violation of Section 8(a)(1) and (5). *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063 (1973), enfd. 505 F.2d 1302 (5th Cir. 1974), cert. denied 423 U.S. 826 (1975).

There is no dispute that while the 1979 attendance policy may have been based upon a "no fault" criteria, providing that all absences and tardys were considered for evaluation despite the reason for the absence, the policy was modified over time. Respondent does not dispute that sometime between 1979 and 2000, the policy was modified to recognize doctor's statements as justification for some employee absences. The parties' collective-bargaining agreement that was in effect on March 15, 2000 provides in article IX that an employee shall be considered absent for justifiable cause if he is "so sick that he is unable to report for work and is able to prove such sickness" or "of the sickness or death of some member of his family makes his attendance impossible, and he is able to prove such sickness or death." Respondent's March 15, 2000 attendance policy essentially eliminated sections (b) and (c) of article IX by imposing the rule that despite the availability of a doctor's statement, an employee's absence will nevertheless trigger absence or tardy points under the policy.

The General Counsel also asserts that Respondent's March 15, 2000 policy invalidated section 1 of contract article XVII, which deals with the notification time Respondent requires an employee to provide when reporting his or her absence from work. Section 1 provides that if unavoidably prevented from reporting, an employee must give notice to his foreman, or at the office at least 4 hours before his tour goes on duty, unless circumstances beyond the employee's control prevents him from giving such notice. General Counsel submits that the new attendance policy eliminated an employee's option to provide less than 4 hours notice when reporting his or her absence, in cases where circumstances beyond the employee's control prevented him or her from providing such notice. Under the new policy, an employee who failed to follow the notification requirements is assessed as "ABSENCE WITH NO CALL IN" and would be subject to the assignment of 4 attendance points.

Clearly, Respondent's March 15, 2000 changes to the attendance policy were modifications of the parties' collective-bargaining agreement and changes in employees' terms and conditions of employment. Respondent does not deny that it took such action without bargaining with the IBEW.

B. Whether the IBEW Waived Its Right to Bargain

A recognized exception to this rule is that a unilateral change by an employer may be permissible if the union has "clearly and unmistakably" waived its statutory right to bargain over the particular subject matter. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708, 103 S. Ct. 1367 (1983), *Resorts International Hotel Casino v. NLRB*, 996 F.2d 1553, 1559 (3d Cir. 1993). A union's waiver of its statutory right to bargain over a particular matter can occur by the express language in the collective-bargaining agreement, or it may be implied from the parties' bargaining history, past practice, or a combination of both. See *KIRO, Inc.*, 317 NLRB 1325, 1327 (1995). The Board has consistently found that management rights clauses that are couched in general terms and make no reference to any particular subject area will not be construed as waivers of statutory bargaining rights. The waiver must be clear and unmistakable. *Michigan Bell Telephone Co.*, 306 NLRB 281 (1992); *Johnson-Bateman Co.*, 295 NLRB 180, 185 (1989). The test is not whether the collective-bargaining agreement can be reasonably construed to affect such a waiver, but rather whether, the undertaking is "explicitly stated" and thus the bargaining is clearly and unmistakably waived. *AK Steel Corp.*, 324 NLRB 173 (1997). In order to determine whether this test has been met, the Board has looked to the precise wording of the provision of the agreement that is in question.

Article XVI of the collective-bargaining agreement provides in section 1:

> The parties recognize that the operation of the plant and the direction of the work force therein is the sole responsibility of the company. Such responsibility includes, among other things, the full right to assign work, to discharge, discipline, or suspend for just cause, and the right to hire, transfer, promote, demote, or layoff employees because of lack of work or for other legitimate reasons.

In reaching its decision in *Johnson-Bateman Co.*, the Board considered its prior decisions where the management-rights clauses were not found to be waivers of the union's right to bargain about changes in medical benefits or the transfer policy when the management-rights clauses contained no specific reference to medical benefits or transfer.[7] Even though the management rights clause in *Johnson-Bateman Co.* permitted the employer to unilaterally issue, enforce, and change company rules, there was no specific reference to the subject matter involving the unilateral change.

[7] *Suffolk Child Development Center*, 277 NLRB 1345, 1350 (1985), *Kansas National Education Assn.*, 275 NLRB 638, 639 (1985).

The Board has found that the broad general phrase "manage the business and direct the working force," in the absence of any evidence of bargaining history, fails to demonstrate the requisite "clear and unmistakable waiver." See *Cypress Lawn Cemetery Association* 300 NLRB 609, 615 (1990). Similarly, the management rights clause provision granting the employer the 'right to hire, transfer, promote, lay off, and discharge for proper cause" does not grant the employer the right to unilaterally change any and all existing terms and conditions of employment. *Suffolk Child Development Center*, 277 NLRB 1345, 1350 (1985).

Respondent would also argue that the IBEW waived its right to bargain about the change in the attendance policy, contending that notice was given and there was no timely request to bargain. I do not find this to be the case. Trigg testified that he first learned of the proposed change in the attendance policy on March 8. Although President Carroll testified that he requested that Respondent bargain with the IBEW about the changes in the policy, he does not acknowledge when he first received notice of the proposed change. Lawrimore's testimony that he sent Carroll a copy of the February 26 letter is unrebutted. Accordingly, based upon Lawrimore's unrebutted testimony, I find that initial notice of the proposed change was provided to the IBEW in Lawrimore's February 26 letter. The Board has long held that a reasonable time between notifying the union of a proposed change and its implementation is required under an employer's obligation to bargain in good faith. As the Board specifically stated in *Giba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983):

> To be timely, the notice must be given sufficiently in advance of actual implementation of the change to allow a reasonable opportunity to bargain. However, if the notice is too short a time before implementation or because the employer has no intention of changing its mind, then the notice is nothing more than informing the union of a *fait accompli*.

The record evidence in this case reflects that Respondent's memorandum to Chandler on February 26 merely provided the Union with notice of a fait accompli regarding the attendance policy changes that were to be implemented on March 15. While Lawrimore included a statement that he would meet to discuss concerns, his doing so did not afford the union with a meaningful opportunity to bargain. See *Midwest Power Systems*, 323 NLRB 404, 407 (1997). Although Respondent contends that it made some changes in the proposed policy after talking with PACE and IAM on March 7, Respondent does not deny that it did not waiver in its position with the IBEW or any of the Unions that it had no obligation to bargain concerning the changes in the policy. Respondent contends that it set up the March 7 meeting with the Unions to discuss their concerns and contends that it made some changes in response to their concerns. I do not find that in doing so Respondent satisfied its requisite duty to bargain. The Board has found that an employer does not satisfy its duty to bargain when it meets to discuss the announced changes, yet manifests its belief that it is not obligated to bargain over the changes. *Ciba-Geigy Pharmaceuticals Division*, supra at 1017. Further, an employer does not satisfy its bargaining obligation even though it may indicate that it is willing to discuss the decision that it has made, and yet refuses to delay implementation of its decision. *Mercy Hospital*, 311 NLRB 869, 873 (1993). Accordingly, the union does not waive its right to bargain when the change has essentially been made irrevocable prior to the notice or has otherwise been announced as a matter on which the employer will not bargain. Id at 873.

The Union presented no evidence that it made any written request to bargain about the proposed changed in the attendance policy prior to the March 15 implementation. The only written documentation of any request to bargain is Kyle Trigg's notes from the IBEW's meeting with management representatives on March 13.[8] While it may have been more prudent for the IBEW to make a specific written request to bargain immediately upon receiving the February 26 notice, I do not find that the Union has waived its right to bargain by its failure to do so. The absence of clear evidence that the Union requested bargaining on the matter in issue is not dispositive, as the Board does not require a union to request bargaining when confronted with a fait accompli. *Migali Industries*, 285 NLRB 820, 821 (1987), *Insulating Fabricators*, 144 NLRB 1325, 1331–1332 (1963).

C. Bargaining History and Past Practice

Respondent asserts that the original attendance policy was implemented in the late 1970's without objection by the IBEW. Respondent argues that no reference was made to the attendance policy during the 1984 negotiations and further argues that by its silence the IBEW waived its right to bargain concerning any further changes in the attendance policy. The Board has declined to find that a party to a contract has waived its rights to bargain concerning mandatory subjects of bargaining simply because it failed to mention the subject; instead the Board requires "a conscious relinquishment by the union, clearly intended and expressed." See *Elizabethtown Water Co*., 234 NLRB 318, 320 (1978), *Perkins Machine Co*., 141 NLRB 98, 102 (1963). The matter must be "fully discussed" and "consciously explored." *Bunker Hill Co.*, 208 NLRB 27, 33 (1973), *New York Mirror*, 151 NLRB 834, 840 (1965). Admittedly, inasmuch as there was no mention, much less discussion of the attendance rules, I must conclude that there was no discussion or agreement that the management rights clause permitted unilateral changes in the existing attendance policy. Thus, I don't find that the absence of discussion of the attendance policy in the 1984 negotiations constituted the Union's waiver of its right to bargain about that subject. *Johnson-Bateman Co*., supra at 187.

---

[8] Lawrimore testified that during the March 13 meeting, Teaster did not discuss any specific problems with the policy and only stated that he was not in a position to negotiate or bargain about the attendance policy. I do not credit Lawrimore's recall of this meeting. I find it incredible that the IBEW specifically met with Respondent to discuss its concerns about the attendance policy scheduled for implementation in two days and yet provided no specifics as to why the union wanted to bargain about the policy. I credit Teaster and Trigg in their description of what occurred during the March 13 meeting.

Respondent also asserts that over time changes were made to the attendance policy without bargaining with the Union. As noted by the Board in *Owens-Corning Fiberglas*, 282 NLRB 609 (1987), the fact that an employer previously changed the terms of a particular program or policy without bargaining does not preclude a union from demanding to bargain over the most recent change. Specifically, I note that the Board in *Murphy Diesel Co*., 184 NLRB 757, 763 (1970), enfd. 454 F.2d 303 (7th Cir. 1971) held that the union's past acquiescence in the employer's unilateral promulgation of work rules concerning lateness and absenteeism did not constitute a waiver of the union's right to bargain about the employer's subsequent promulgation of stricter rules concerning lateness and absenteeism. As the Board further noted in *Exxon Research & Engineering Co*., 317 NLRB 675 at 685–686 (1995),[9] "union acquiescence in past changes to a bargainable subject does not betoken a surrender of the right to bargain at the next time the employer might wish to make yet further changes, not even when such further changes arguable are similar to those in which the union may have acquiesced in the past." Thus, I do not find that the IBEW's acquiescence by failing to demand previous bargaining concerning the attendance policy sufficient to constitute a waiver of its right to bargain over the 2000 changes in the attendance policy. See *Guard Publishing Co*., 339 NLRB 353, 357 (2003). Likewise, I do not find the IBEW's failure to request bargaining about the attendance policy during the 2002 negotiations to constitute a waiver of its bargaining rights. At the time of the contract renewal negotiations in 2002, the IBEW had already filed an unfair labor practice charge with the Board on April 24, 2000, as well as a grievance through the grievance-arbitration provision of the collective-bargaining agreement. The arbitrator had issued his decision approximately 5 months earlier. While complaint did not issue in this matter until January 27, 2003, there is no evidence that the IBEW withdrew its charge or abandoned its position despite the arbitrator's February 2002 ruling. President Carroll acknowledged that there was no discussion during the 2002 contract negotiations concerning the 2000 changes to the attendance policy. Carroll testified that the Union had already filed a charge with the Board as well as the grievance and he was certainly aware of Respondent's position on the attendance policy. Carroll explained that he felt that the attendance was a separate issue that was already being addressed in the unfair labor practice as well as in the grievance. The very fact that as of the 2002 negotiations, the IBEW had not withdrawn either its grievance or its unfair labor practice charge would evidence its position on the change in the attendance policy. The failure to again raise the issue during the 2002 negotiations does not constitute a waiver of its right to bargain concerning this unilateral change.

D. Whether Deferral to the Arbitrator's Award is Appropriate

On February 20, 2002, the IBEW's March 28, 2000 grievance was arbitrated before a mutually chosen arbitrator. In his decision of June 3, 2002, the arbitrator referenced the contract's management-rights clause giving the Respondent the sole responsibility to operate the plant and direct the work force. Relying upon the decision of an arbitrator in another case, the arbitrator stated: "the promulgation of an attendance policy, designed as it is to control absenteeism, is a fundamental management right which is presumed to be inherent in the management role absent specific agreement otherwise." In an abbreviated explanation of his rationale, the arbitrator further stated: "Indeed, it is really incumbent upon Management to have such policies since it is a means of ensuring that employees come to work regularly and on time." The arbitrator found that there is no requirement that an employer negotiate an absentee policy with a union in the absence of some contractual requirement. Finding there to be no contractual breach, the grievance was denied.

Both Respondent and the General Counsel agree that the Board's practice is to defer to an arbitrator's decision if the arbitration proceedings were fair and regular, all parties agreed to be bound, the decision of the arbitrator is clearly not repugnant to the purpose and policies of the Act, and the arbitrator adequately considered the unfair labor practice issues that the Board is called upon to decide. *Spielberg Mfg. Co*., 112 NLRB 1080, 1082 (1955), *Olin Corp*., 268 NLRB 573 (1984). In its decision in *Olin*, id at 574, the Board further confirmed that it would find that an arbitrator had adequately considered the unfair labor practice issue if (1) the contractual issue is factually parallel to the unfair labor practice issue and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. The Board has further determined that deferral is inappropriate under the clearly repugnant standard only when the arbitrator's award is not susceptible to an interpretation consistent with the Act. *Motor Convoy*, 303 NLRB 135 (1991).

While Respondent argues that deferral to the arbitration award is appropriate, General Counsel argues that the issue analyzed by the arbitrator was not parallel to the unfair labor practice issues and the arbitrator's opinion and award is repugnant to the Act and insusceptible to an interpretation consistent with the Act.

The Board reiterated its position in *NCR Corp*., 271 NLRB 1212, 1213 (1984), that when "an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it," the Board will not enter the dispute to serve the function of arbitrator in determining which party's interpretation is correct.[10]

When the language is clear and unambiguous however, the interpretative skills of an arbitrator are unnecessary, and the Board is thereby not required to defer the issue to arbitration. *Grane Health Care, Inc*., 337 NLRB 432, 436 (2002). In the present case, there is no contractual provision specifically addressing the subject matter of Respondent's changes nor susceptible of two equally plausible interpretations. Further, I note that Respondent does not cite a clause or clauses in the contract that are susceptible to more than one plausible interpretation

[9] The Fifth Circuit Court of Appeals denied enforcement because the court determined that ERISA trustees rather than the employer ordered unilateral changes to the employees' ERISA benefit plan. *Exxon Research and Engineering Co. v. NLRB*, 89 F.3d 228 (5th Cir. 1996).

[10] Citing language from its previous decision in *Vickers, Inc.*, 153 NLRB 451, 570 (1965).

and Respondent simply relies upon a broad management-rights clause as a basis for its unilateral change in the attendance policy. Thus, the issue does not appear to be based solely upon contract interpretation.

In his brief, counsel for Respondent cites *Dennison National Co.*, 296 NLRB 169, 170 (1989), arguing that the Board has deferred to an arbitrator's award based upon a general management rights clause, despite the fact that the contract did not expressly waive the right to bargain over the subject of the grievance. Respondent argues that in the instant matter, the arbitrator found that Respondent "had to have the right to make rules in order to implement its contractual rights 'to discharge, to discipline, or suspend for just cause.'" Respondent is correct that in *Dennison National Co.*, the arbitrator expressly found that under the management-rights clause of the contract, the employer had the right to act unilaterally. While the arbitrator specifically found that the right to unilaterally eliminate a classification was a right reserved to it by the management rights clause, the Board also noted "an employer can violate its statutory obligation to bargain without also violating its collective-bargaining agreement."[11]

In *Columbian Chemicals Co*., 307 NLRB 592 (1992), however, the Board declined deferral to the arbitrator's decision. In doing so, the Board noted that the arbitrator did not find the management-rights clause as the authority for the employer's unilateral action. Rather than relying upon the management rights-clause, the arbitrator relied upon a "basic management prerogative" as the authority to change the rules in issue. Certainly, in this matter, the arbitrator's determination that the promulgation of the attendance policy was a "fundamental management right" is clearly analogous to the arbitrator's rationale in *Columbian Chemicals Co*. In his June 2002 decision, the arbitrator cited the management-rights clause as simply giving Respondent the right to make rules. In the arbitration in issue here, the arbitrator went on to state:

> Managements act and Unions react. Could a company negotiate an absentee policy with a Union? The answer to that query is, of course, in the affirmative. However, in my understanding, there is no requirement that it do so, absent some contractual requirement, not present in the instant case. Simply put then, I find that there has been no contractual breach, so that the grievance must be denied.

In *Armour & Co.*, 280 NLRB 824 fn. 2 (1986), the arbitrator found that the parties' contract did not prohibit a challenged unilateral change by the employer, but the arbitrator did not consider whether the respondent employer had fulfilled, or the union had agreed to waive, any statutory duty to bargain. In declining to defer, the Board noted that the absence of a "contract prohibition" of the employer's action was neither conclusive of the statutory issue nor inconsistent with a finding that the respondent employer had breached its statutory duty to bargain.

I find the circumstances of this case similar to those involved in a recent Board decision where the Board found that the arbitrator did not adequately consider the unfair labor practice issue. In *Kohler Mix Specialties*, 332 NLRB 630, 632 (2000), the Board opined that the issue before the Board was whether the respondent, by failing and refusing to bargain with the union about its decision to unilaterally subcontract its over-the-road delivery operation, violated respondent's statutory obligation to bargain under Sections 8(d) and 8(a)(5) of the Act. The Board noted that in order to make such a determination, it was necessary to determine whether the decision was a mandatory subject of bargaining, whether the union waived its right to bargain over the decision or effects, and whether the employer satisfied its statutory obligation to bargain. The arbitrator however, limited his analysis to whether any provision of the parties' contract prohibited the employer's unilateral decision to subcontract the over-the-road delivery operation.

Based upon the entire record, I do not find that deferral to the arbitrator's decision is appropriate. The arbitrator made no finding as to whether the unilateral change in the attendance policy was a mandatory subject of bargaining or whether the attendance policy changes unilaterally changed the terms of the collective-bargaining agreement. Additionally while the arbitrator concluded that over the years the absentee policy was never the subject of negotiations, the arbitrator did not address whether the union waived its right to bargain in negotiations or otherwise.

In summary, I do not find that the issues analyzed by the arbitrator were parallel to the unfair labor practice issues and the arbitrator's award is clearly repugnant to the Act and insusceptible to an interpretation consistent with the Act.[12] Accordingly, I do not find deferral to the arbitrator's award appropriate.

E. Whether the Unit Size Excuses Respondent's Bargaining Obligation

Complaint Paragraph 5 sets forth the bargaining unit description for those employees for whom the IBEW has been the recognized and designated exclusive representative at all material times. In its answer, Respondent denies the appropriateness of the bargaining unit. The record contains testimony and documentary evidence reflecting that between February 4, 2002 until October 2002 and from January 2003 until June 2003, there was only one employee in the IBEW unit. Respondent has presented no evidence to show that there was only one employee in the bargaining unit at the time of its unilateral implementation of its attendance policy in March 2000. Despite Respondent's position on the appropriateness of the unit, the Board has long held that when an employer employs more than one unit employee on a permanent basis, such employer is not privileged to unilaterally change terms and conditions of employment without affording the union an opportunity to bargain. *Copier Care Plus*, 324 NLRB 785 fn. 3 (1997). *Crispo Cake Cone Co.*, 190 NLRB 352 (1971). It is Respondent's burden to establish the existence of a stable single-employee unit and that the reduction in unit size is a permanent reduction and not merely a temporary happenstance resulting from per-

[11] *Dennison National Co.*, Id at 170 fn. 6.

[12] *Kohler Mix Specialties*, supra at 2, H*addon Craftsmen, Inc*., 300 NLRB 789, 790 fn. 5 (1990).

sonnel shifts. *Ray Black & Sons Co*., 335 NLRB No. 38 (2001); *Goodman Investment Co.*, 292 NLRB 340, 348 (1989).

Respondent has not met its burden of establishing that any reductions in the unit were permanent. The record reflects that there has been more than one unit employee for significant periods of time, including the time in which Respondent unlawfully implemented its March 15, 2000 attendance policy and at the present. Accordingly, the size of the bargaining unit neither excuses Respondent's bargaining obligation nor invalidates the appropriateness of the unit.

F. Conclusions

The foregoing leads me to find that the March 15, 2000 attendance policy constitutes material, substantial, and significant alterations of the preexisting attendance policy as well as a unilateral modification of the terms of the parties' collective-bargaining agreement and that Respondent unilaterally implemented these changes without affording the IBEW a meaningful opportunity to bargain about the changes or the effect of the changes on the bargaining unit employees. I conclude therefore, that in doing so, Respondent has violated and continues to violate Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent, Smurfit-Stone Container Corporation, Container Division, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, the International Brotherhood of Electrical Workers, Local No. 1924, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The bargaining unit as described in Paragraph 5 of the complaint constitutes an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act, and at all times material, the IBEW has been the exclusive bargaining representative of the employees in the aforesaid unit.

4. By unilaterally implementing the March 15, 2000 attendance policy, the Respondent has violated Section 8(a)(5) and (1) of the Act.

5. The unfair labor practices committed by Respondent are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, Respondent must cease and desist from the continued implementation of the March 15, 2000 attendance policy, rescind the unilaterally implemented attendance policy, and cease disciplining employees pursuant to this policy. I shall recommend that Respondent fully restore the status quo ante that existed at the time of its unlawful actions by rescinding the disciplinary actions against bargaining unit employees resulting from the unilaterally instituted attendance policy. I shall further recommend that Respondent offer all bargaining unit employees discharged, suspended, or otherwise denied work opportunities as a result of this unilaterally implemented attendance policy, immediate and full reinstatement and make the employees whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Respondent shall also be required to remove from its files any and all references to the unlawful discharges, suspensions, and discipline and to notify all employees so affected in writing that this has been done.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, Smurfit-Stone Container Corporation, Container Division, San Fernandina Beach, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing the terms and conditions of employment of its bargaining unit employees by implementing a new attendance policy without affording the IBEW an opportunity to bargain about the changes and the effect of the changes on the bargaining unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) On request, bargain collectively with the IBEW as the exclusive representative of the bargaining unit employees concerning any material changes in the attendance policy.

(b) Rescind the March 15, 2000 attendance policy.

(c) Remove from the files of all bargaining unit employees all discharges, warnings, or memoranda issued pursuant to the March 15, 2000 attendance policy.

(d) Offer all employees discharged, suspended, or otherwise denied work opportunities as a result of the implementation of the March 15, 2000 attendance policy immediate and full reinstatement to their former positions, or if they no longer exist, to substantially equivalent ones, without prejudice to their seniority or other rights and privileges.

(e) Make whole all employees who were discharged, suspended, or otherwise denied work opportunities as a result of the unilaterally implementation of the March 15, 2000 attendance policy, in the manner set forth in the remedy section of this decision.

(f) Within 14 days from the date of this Order, remove from its files any reference to the discipline issued pursuant to the March 15, 2000 attendance policy and within 3 days thereafter notify the employees in writing that this has been done and that the discipline will not be used against them in any way.

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its San Fernandina Beach, Florida facility, copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 15, 2000.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 11, 2003

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with the International Brotherhood of Electrical Workers, Local No. 1924, AFL–CIO, by unilaterally implementing a new attendance policy.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the International Brotherhood of Electrical Workers, Local No. 1924, AFL–CIO concerning any terms and conditions of employment for our employees in the bargaining unit:

> All hourly rated electricians employed by the Employer in the Container Division at its facility located in Fernandina Beach, Florida, but excluding all other hourly rated employees, and also excluding clerical and office Employees, professional employees, guards, and supervisory employees as defined in the Act.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discipline issued pursuant to the March 15, 2000 attendance policy, and WE WILL, within 3 days thereafter, notify those employees so affected in writing that this has been done and that the discipline will not be used against them in any way.

SMURFIT-STONE CONTAINER CORPORATION,
CONTAINER DIVISION

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."